

CCASE:
LOCAL UNION (UMWA) V. WILLIAMSON SHAFT
DDATE:
19800131
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

LOCAL UNION NO. 6843, DISTRICT 28, Complaint for Compensation
UNITED MINE WORKERS OF AMERICA, Docket No. VA 80-17-C
 APPLICANTS
 v. Amonate No. 31 Mine

WILLIAMSON SHAFT CONTRACTING COMPANY,
 RESPONDENT

DECISION

Appearances: Mary Lu Jordan, Esq., United Mine Workers of America,
 Washington, D.C., for Applicants Timothy J. Parsons,
 Esq., Loomis, Owen, Fellman & Howe, Washington, D.C.,
 for Respondent

Before: Judge Charles C. Moore, Jr.

Applicants United Mine Workers filed a complaint for compensation under section 111 of the Act (Federal Mine Safety and Health Act of 1977), based upon events which transpired during a roof control inspection conducted by MSHA inspector Carl E. Boone on August 9, 1979, at Consolidation Coal Company's Amonate No. 31 Mine.

The facts not in issue show that Inspector Boone conducted a roof control inspection of "the main headings being turned off the ventilation shaft" (Complaint, para. III). The shaft and headings in question were being constructed by Respondent Williamson Shaft Contracting Company pursuant to a contract with Consolidation Coal Company. After this, the facts are disputed.

In a report filed by Inspector Boone with his supervisor, (FOOTNOTE 1) the inspector states that upon inspecting the roof bolt installation near the bottom of the shaft in question he found that the majority of the roof

bolts installed against the coal roof had less torque than that required by Consolidation Coal Company's approved roof control plan. This allegation is denied by Respondent.

Inspector Boone wrote that "the company" was also checking the roof bolts and makes further reference to "management." It is unclear whether he is referring to the management of Consolidation Coal Company or to William Shaft Contracting Company but for the purposes of this decision I will assume he means Consolidation Coal Company. The report further states that when management asked for Inspector Boone's recommendations concerning the roof bolts, he informed them that they could either rebolt the area using mechanical bolts with adequate anchorage or use resin rods. The company decided to use resin rods, to be installed within 1 or 2 days after the proper materials were ordered and delivered. At this point, Inspector Boone told the company that the only work that they should do in the area would be to install one of the roof support methods he had recommended in order to comply with safety precaution No. 12(c) of their approved roof control plan. As a result of this recommendation, several miners were idled during the day and afternoon shifts on August 9, 1979.

Section 111 of the Act (30 U.S.C. 821) entitles miners to compensation at varying rates for the time they are idled when a mine or a portion of a mine is closed pursuant to an order issued under sections 103, 104 or 107 of the Act (30 U.S.C. 813, 814 and 817, respectively). Applicants claim that Inspector Boone's recommendation amounted to a verbal withdrawal order under section 107(a) of the Act (Complaint, para. IX). That section reads as follows:

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

Thus, an inspector may issue withdrawal orders under this section where he or she determines that an imminent danger exists. However, subsection (d) of section 107 specifically requires such orders to be in writing. (FOOTNOTE 2)

Construing the facts in a light most favorable to the Applicants, (FOOTNOTE 3) there is no evidence in this case of a specific verbal finding of imminent danger by the inspector, nor of a written finding of imminent danger nor, as both parties concede, of a written withdrawal order pursuant to section 107.

Applicants point out that Inspector Boone's statement had the same effect as a withdrawal order by causing a temporary cessation of mining activities. Applicants then use a "but for" test to create a causal nexus between the Inspector's statement and their claims for compensation. Assuming that Inspector Boone's statement did cause a cessation of mining activities, idling some miners, it is necessary to determine whether section 111 or any other section of the Act anticipates an award of compensation in such a case.

As to other than imminent danger orders, subsections (a) through (f) of section 103 of the Act authorize the Secretary to inspect mines, investigate accidents, require operators to maintain records, and provide for a representative of the miners to accompany inspectors during inspections. Section (g) provides for miner-initiated inspections upon a written notice to the Secretary alleging a violation of the Act or an imminent danger. These inspections may be conducted independently or may be incorporated into a regular inspection by the Secretary. There is no evidence in this case that the inspection which took place was initiated by a miner or by a representative of the miners.

Subsections (h) through (j) of section 103 provide for the maintenance of certain records, prescribe a minimum number of inspections of mines containing explosive gases and set forth the Secretary's powers in the event of an accident. Subsection (k) authorizes the Secretary to issue appropriate orders in accident situations. The alleged order in this case was not connected to an accident in the mine.

Section 104(b) authorizes the Secretary to issue orders where an operator has failed to abate a violation for which he was cited within the time allowed and the Secretary determines that the abatement time should not be extended. There is no evidence of a prior citation in this case. Section 104(d) allows withdrawal orders to issue in two cases. In the

first case, the Secretary must issue a withdrawal order under section 104(d)(1) where an operator violates, unwarrantably, any mandatory health and safety standard within 90 days of the issuance of an unwarrantable failure citation. In the second case, an order must promptly issue under section 104(d)(2) where the Secretary, upon subsequent inspection, finds violations similar to those in the original unwarrantable failure citation and no interim inspection has verified abatement of the original violations. Again, there is no evidence of a citation in this case so that the alleged order could not have been issued pursuant to section 104(d). Section 104(e) allows the Secretary to issue withdrawal orders where it finds that an operator has a pattern of violating mandatory health or safety standards. There is no evidence of such a pattern in this case. Section 104(f) allows the Secretary to issue withdrawal orders where it finds that the atmosphere of a mine contains an excessive amount of respirable dust. There is no evidence that the order alleged here was such an order.

The statutory scheme outlined above anticipates that withdrawal orders would be issued subsequent to the issuance of a citation where the operator either has not abated the condition described in the citation or the condition has recurred, except in the case of imminent danger orders which may be issued without reference to particular health and safety standards. While sections 103 and 104 of the Act do not specifically require orders issued thereunder to be in writing, there are other references in the Act to publishing orders and making them available for public inspection which assumes that the orders would be in writing. Although section 107 is the only section which specifically requires orders to be in writing, it appears that all orders under the 1977 Act are expected in all cases to be in writing. The legislative history is in accord.

Section 111 of the 1977 Act entitling miners to compensation for idle time was taken directly from its counterpart in the Federal Coal Mine Health and Safety Act of 1969 ("1969 Act"): section 110(a). (See Legislative History of the Federal Mine Safety and Health Act of 1977 at 1337.) Section 110(a) of the 1969 Act entitled a miner to compensation for time lost when a mine was closed by an order issued under section 104 of the 1969 Act. Section 104 in turn described the various withdrawal orders the Secretary could have issued upon finding violations of the Act and imminent dangers and required, inter alia, in subsection (f) that "all such notices and orders shall be in writing." Thus, the requirement of a writing is clearly stated under the 1969 Act.

Applicant further offers the case of Alabama By-Products Corporation v. Mining Enforcement and Safety Administration and United Mine Workers of America, BARB 76-153, 76-220 and 76-221 (August 19, 1976), in support of its position that a verbal recommendation can constitute an order of withdrawal. It should be noted that the administrative law judge in that case was considering a written citation and specifically confined his decision to the facts presented (at 19).

Based upon the foregoing, the only type of withdrawal order the inspector could have issued would have been for imminent danger and he clearly did not do that.

ORDER

Respondent's motion to dismiss is hereby GRANTED.

Charles C. Moore, Jr.
Administrative Law Judge

~FOOTNOTE 1

Attached to Applicants' Statement in Opposition to Respondent's Motion to Dismiss as Exhibit A (sent under separate cover). I do not consider this report to be determinative of the facts but treat it as relevant evidence. Any denials by Respondent as to the contents of the inspector's report are duly noted, *infra*.

~FOOTNOTE 2

Section 107(d) provides as follows:

"Each finding made and order issued under this section shall be given promptly to the operator of the coal or other mine to which it pertains by the person making such finding or order, and all of such findings and orders shall be in writing, and shall be signed by the person making them. Any order issued pursuant to subsection (a) may be modified or terminated by an authorized representative of the Secretary. Any order issued under subsection (a) or (b) shall remain in effect until vacated, modified, or terminated by the Secretary, or modified or vacated by the Commission pursuant to subsection (e), or by the courts pursuant to section 106(a)." (Emphasis added.)

~FOOTNOTE 3

As required by Federal Rules of Civil Procedure Rule 56, 28 U.S.C.A. (note 124), advisory for purposes of Commission decisions.